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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

JOSEPH HOWARD, JR.,

Petitioner,

v.

SONY BMG MUSIC ENTERTAINMENT, INC., *et al.*,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves claims of copyright infringement. The District Court relied only upon the initial album release date of the accused work (first publication date) to find that no "claim accrued" within three years of the filing date of the Complaint, which resulted in a complete bar to all copyright infringement relief under §507(b) of the Copyright Act. The district court did not analyze, inquire, or determine when infringing sales occurred, or if sales occurred within three years prior to the filing date of the Complaint, after the Complaint was filed, and are still being made.

The U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's ruling under §507(b) of the Copyright Act (*App. A, 6a*), which is consistent with other precedent from the Fifth Circuit holding that the "the relevant inquiry" for determining if a legal claim is actionable under the Copyright Act does not depend on "when the infringement occurred." *See Groden v. Allen,* 2008 U.S. App. Lexis 66 (5th Cir. Jan. 3, 2008). These Fifth Circuit decisions conflict with decisions from other Court of Appeals (Second, Fourth and Sixth Circuits) on this important matter.

1. Whether it is proper to rely only upon an initial publication date of the accused work, without considering when infringing sales occurred, to determine whether a copyright infringement cause of action "accrued" under §507(b) of the Copyright Act.

2. Whether the Order from the District Court should have been reviewed in light of evidence withheld from the Plaintiff (and the District Court) until well after the conclusion of the trial court briefing on Sony BMG's summary judgment motion and after the close of appellate briefing, especially where the District Court found, upon reviewing the withheld evidence in a latter motion, that it "clearly should have been provided to the Court in response to Sony BMG's Motion for Summary Judgment." *Order, App. A, 20-21a.*

3. Whether genuine issues of material fact in dispute existed as to equitable estoppel, repudiation, fraud and negligent misrepresentation claims based on repeated communications from Defendant Sony BMG that advised the Plaintiff-Petitioner that he would be paid what he was owed for his musical contributions to the album.

PARTIES TO THE PROCEEDING
(Rule 14.1(b))

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Petitioner: Joseph Howard, Jr., an individual.

Defendant-Appellee and Respondent: Sony BMG Music Entertainment, Inc. (as successor in interest for Sony Music), individually and d/b/a Columbia Records and Loud Records.

Other Defendants: Wesley E. Weston, Sukafree Records, Inc., Lucky Publishing Company, Estelle Hobbs, Jr., And Hobbs Publishing Company.

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PETITION FOR WRIT OF CERTIORARI

Joseph Howard, Jr. respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit, dated September 22, 2008, is reported at 2008 WL 43022220 (5th Cir. Sept. 22, 2008), and is reproduced at App. A, 3a-7a. The Fifth Circuit's October 16, 2008 denial of the Petition for Panel Rehearing and Petition Rehearing En Banc is reproduced at App. A, 1a-2a.

The Memorandum and Order of the U.S. District Court for the Southern District of Texas, Houston Division, dated August 31, 2007, is reproduced at App. A, 8a-14a, with the Final Judgment of that Court reproduced at App. A, 15a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 13.1 and 13.3. This Petition for Writ of Certiorari is being filed within ninety days of the denial of a Petition for Panel Rehearing and Rehearing En Banc filed with the U.S. Court of Appeals for the Fifth Circuit. On October 16, 2008, the U.S. Court of Appeals entered

its denial of the timely filed Petition for Rehearing and Petition for Rehearing En Banc. *Order, App. A, 1a-2a.*

The Petitions for Panel Rehearing and Rehearing En Banc were timely filed the Fifth Circuit on September 29, 2008, within fourteen days of date of the Judgment and Order of the U.S. Court of Appeals for the Fifth Circuit dated September 22, 2008, which was the Order issued from a timely appeal of the District Court's decision of August 31, 2007.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8, Paragraph 8 of the United States Constitution provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

From the Copyright Act, 17 U.S.C. §302(a) provides that a "[c]opyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death."

From the Copyright Act, 17 U.S.C. §507(b) provides that "[n]o civil action shall be maintained under the provisions of this title unless it is

commenced within three years after the claim accrued."

STATEMENT OF THE CASE

Factual Background

This case involves the legal claims of a music producer, Mr. Jordan, who supplied music and sound recordings on a Platinum-selling album entitled, *Undaground Legend.* This album was primarily distributed and sold by Sony BMG Music, and Defendant Weston, a well-known "rap" artist in this music genre, was also involved with this album project. The album was initially released in August 2002, but sales are continuing to be made, and were made within three years of the filing date of the Complaint. *See Sony BMG-sponsored Website,*

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Mr. Weston and his primary record company (Sony BMG Music) are accused of refusing to pay several music producers that contributed sound recordings, melodies, and production services on this album. Despite achieving revenues of approximately $10 million dollars from the sale of this Platinum-certified album, many of the music producers on this album were not paid hundreds of thousands of dollars in royalties and fees, contract fees, and other money owed to them by Sony BMG Music and Mr. Weston. The present case is one of three lawsuits filed by three different music

producers that have not been paid for their contributions to the *Undaground Legend*.

The first of these three cases, *Granville v. Sony BMG Music, Weston, et al.*, Civil Action No. H-03-cv-3002, (S.D. Texas) concluded with a jury trial in January 2006, and the jury awarded Mr. Granville $150,000.00 based on the willful copyright infringement of Sony BMG, Mr. Weston, and the other Defendants. The second case is currently pending in the Southern District of Texas. And, the present case is the subject of the present appeal relating to Sony BMG Music.

A contract was signed in 2004 with Plaintiff-Petitioner Howard to resolve the payments owed to him. Sony BMG made a partial payment of $3000, but has not paid any additional amounts that Sony BMG admits are due and owing to the Plaintiff-Petitioner Howard. The Plaintiff-Petitioner music producer, Mr. Howard, was continually promised further payments between 2004 through 2006 by the principal party selling and distributing the album, Respondent Sony BMG and others. In hindsight, Sony BMG appears to have made these promises of payment for the purpose of "stringing along" Mr. Howard so that he would not file a legal action within three years of the album release date.

Admitting that Mr. Howard had not been fully paid under the 2004 contracts, Sony BMG claimed for the first time after suit was filed that it was not the responsible party obligated to pay Mr. Howard under the 2004 contracts because it was not a signatory to that agreement. Relying on that

position, the District Court found no breach of contract by Sony BMG.

Documents provided to the District Court well after its summary judgment ruling, however, raise a genuine issue of material fact as to whether Sony BMG was an "agent" of the signatory to these contracts, thereby making it legally responsible for payment under the 2004 contracts. These agency documents were withheld from production by Sony BMG, and these documents were first provided to the District Court and the Plaintiff in a subsequent motion filed by a co-Defendant in the District Court. Sony claims these agency agreements relate to different albums, but the agency agreement withheld from production was expressly incorporated into the terms of the distribution agreement for the *Undaground Legend* album.

When these documents were first provided to the District Court (after the close of trial court briefing on the Sony BMG summary judgment motion and after the close of appellate briefing), the District Court indicated that this evidence "clearly should have been provided to the Court in response to Sony BMG's Motion for Summary Judgment." *Order, App. A at 20a (last sentence).* This newly discovered evidence was provided to the Plaintiff-Petitioner for the first time within months of the scheduled oral argument at the Fifth Circuit. The U.S. Court of Appeals for the Fifth Circuit denied all motions to consider these "agency" documents as part of the appeal. The scheduled argument at the Fifth Circuit was cancelled pursuant to Federal Rules of Appellate Procedure 34.

Procedural Background

The Complaint was filed in the present case on October 5, 2006, and Mr. Howard's claims included causes of action for copyright infringement, breach of contract, copyright ownership, and fraud and negligent misrepresentation claims against Sony BMG and the other defendants. Factual issues are alleged to be dispute as to the issues of material breach of the contracts, copyright infringement and ownership claims, equitable estoppel, fraud, negligent misrepresentation, and when repudiation of copyright ownership claims occurred.

Sony BMG Music filed a Motion for Summary Judgment, and the District Court granted Summary Judgment on August 31, 2007 in favor of Sony BMG Music. The District Court found that Sony BMG was not liable for breach of contract because Sony BMG was not a party to any agreement signed with the Plaintiff-Petitioner (*App. A, 9a).* The District Court also found that no copyright infringement claims that could be asserted because the initial release of the accused work occurred in 2002, and therefore, no cause of action "accrued" within three years of the filing date of the Complaint. *Order, App. A, 12a-13a.* A Partial Final Judgment was also entered on August 31, 2007 in favor of Sony BMG. *Final Judgment, App. A, 15a.*

The claims against the co-defendants are still being adjudicated, but the preliminary disposition of those claims are being based on the prior decisions rendered by the District Court in this matter. With respect to claims against co-defendant Mr. Weston, a

default has been entered against Mr. Weston for his willful default in the present matter, but no damages were awarded because of the District Court's statute of limitations interpretation under §507(b) of the Copyright Act. An Answer was filed by several other Defendants in this matter largely admitting to almost all of the Plaintiff's contentions in the lawsuit, but the District Court has denied all relief against those Defendants for the same reasons set forth in its earlier summary judgment rulings. *Order, App. A, 21a (sua sponte application of statute of limitations by court denying all copyright relief).* While the present appeal involves only claims that were finally adjudicated on summary judgment against Sony BMG Music Entertainment, this Court's actions will have an impact on these other matters.

On September 26, 2007 (within thirty days of the Final Judgment), the Plaintiff Howard filed a Notice of Appeal appealing the District Court's August 31, 2007 Summary Judgment Order and the Partial Final Judgment. The Appeal was taken to the U.S. Court of Appeals for the Fifth Circuit, and jurisdiction for the appeal was supported by 28 U.S.C. §1291, as well as the Federal Rules of Appellate Procedure and the U.S. Court of Appeals for the Fifth Circuit Rules of Appellate Procedure.

On September 22, 2008, the U.S. Court of Appeals for the Fifth Circuit issued its Order and Judgment affirming the District Court's judgment relating to Sony BMG. *See Order, App. A, 3a-7a.* The Fifth Circuit found that the District Court's Summary Judgment was proper because no evidence

was presented that Sony BMG was obligated to perform under the 2004 contracts and, as found by the District Court, all copyright infringement claims were barred by the statute of limitations under §507(b) of the Copyright Act. *Order, App. A, 6a-7a.*

A Petition for Panel Rehearing and Petition for Rehearing En Banc was timely filed by the Plaintiff-Petitioner Howard on September 29, 2008, which was within 14 days after entry of judgment. The Petition for Panel Rehearing and Rehearing En Banc were filed with the U.S. Court of Appeals for the Fifth Circuit under the Federal Rules of Appellate Procedure 35 and 41 and the U.S. Court of Appeals for the Fifth Circuit Rules of Appellate Procedure.

On October 16, 2008, the U.S. Court of Appeals entered its denial of the timely filed Petition for Rehearing and Petition for Rehearing En Banc. *App. A, 1a-2a.* This Petition for Writ of Certiorari is being filed within ninety days of the denial of Petitions for Rehearing filed with the U.S. Court of Appeals for the Fifth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 13.1 and 13.3.

REASONS FOR GRANTING THE PETITION

For claims of copyright infringement, this Court has never addressed whether otherwise viable "accrued" claims subject to §507(b) of the Copyright Act can be barred because an initial publication of the accused work occurred prior to the three year window set forth in §507(b). This important question should be addressed, and this Court should determine if an absolute bar against all copyright infringement recovery arises under 17 U.S.C. §507(b) with an initial publication of the accused work more than three years prior to the Complaint filing, without considering whether sales of the accused work occurred within three years of Complaint filing or thereafter. The Circuit Courts that have addressed this important issue are split, and this Court's guidance is urgently warranted to resolve this issue of law.

The U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's ruling under §507(b) of the Copyright Act (*App. A, 6a*), which is consistent with precedent from the Fifth Circuit holding that the "the relevant inquiry" for determining if a legal claim is actionable under the Copyright Act does not depend on "when the infringement occurred." *See Groden v. Allen*, 2008 U.S. App. Lexis 66 (5th Cir. Jan. 3, 2008). In these cases, the Fifth Circuit analysis of 17 U.S.C. §507(b), expressly rejected any consideration of when infringing sales occurred, or if sales occurred within three years prior to the filing date of the Complaint,

after the Complaint was filed, and are still being made.

Under the cited Fifth Circuit interpretation of 17 U.S.C. §507(b), all claims of copyright infringement for sales within three years of the filing date of the Complaint are precluded if the accused work was initially published before the three year window set forth in §507(b) of the Copyright Act. This interpretation would effectively preclude otherwise viable claims of copyright infringement arising from sales within three years of the Complaint filing, which is not consistent with the interpretation of §507(b) by other Circuits.[1]

The Fifth Circuit's interpretation of §507(b) appears to undetermine the obligations assigned to Congress under Article I, Section 8, Paragraph 8 in the United States Constitution, "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In order to properly promote and secure the rights of authors to their copyrighted material, this Court should grant the Petition for Writ of Certiorari.

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[1] *Stone v. Williams*, 970 F.2d 1043, 1049-1050 (2nd Cir. 1992), *cert. denied*, 124 L. Ed. 2d 243 (1993) (an accused infringing sale three years prior to filing date of Complaint is actionable because "each act of infringement is a distinct harm that gives rise to an independent claim for relief"); *Kregos v. Associated Press*, 3 F.3d 656, 662 (2nd Cir. 1993) (same); *Hoste v. Radio Corp. of America*, 654 F.2d 11, 11 (6th Cir. 1981)(same); *Bridgeport Music, Inc. v. Diamond Time, Ltd.*, 371 F.3d 883, 890-91 (6th Cir. 2004) (same); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 202 (4th Cir. 1997) (same).

This Petition for Writ of Certiorari should be granted to address the split in the Circuit Court's interpretation of 17 U.S.C. §507(b), and to correct the incorrect interpretation adopted by the U.S. Court of Appeals for the Fifth Circuit. Accordingly, this Court should grant this Petition for Writ of Certiorari because this Court's guidance is needed to resolve the issue of whether it is proper to rely only upon an initial publication date of the accused work, without considering when infringing sales occurred, to determine whether a copyright infringement cause of action has "accrued" under §507(b) of the Copyright Act.

I. REVIEW IS WARRANTED TO RESOLVE A CIRCUIT CONFLICT CONCERNING THE INTERPRETATION OF 17 U.S.C. §507(b) FOR COPYRIGHT INFRINGEMENT CLAIMS

A. The Fifth Circuit's Interpretation of §507(b) Conflicts With The Interpretation Given By Numerous Other Circuits

The Second, Fourth and Sixth Circuits have found that each infringing sale within three years of the Complaint filing date constitutes an individual "claim" that separately "accrues" under 17 U.S.C. §507(b). *Stone v. Williams*, 970 F.2d 1043, 1049-1050 (2nd Cir. 1992), *cert. denied*, 124 L. Ed. 2d 243 (1993)(each sale constitutes a separate cause of action, and each infringing sale occurring three years prior to filing date of Complaint is actionable); *Kregos v. Associated Press*, 3 F.3d 656, 662 (2nd Cir.

1993) (same); *Hoste v. Radio Corp. of America,* 654 F.2d 11 (6th Cir. 1981) (same); *Bridgeport Music, Inc. v. Diamond Time, Ltd.,* 371 F.3d 883, 890-91 (6th Cir. 2004)(same); *Hotaling v. Church of Jesus Christ of Latter-Day Saints,* 118 F.3d 199, 202 (4th Cir. 1997) (same).

The District Court relied only upon the initial album release date of the accused work (first publication date) to find that no "claim accrued" within three years of the filing date of the Complaint, which resulted in a complete bar to all copyright infringement relief under §507(b) of the Copyright Act. *Order, App. A, 12a-13a.* The district court did not analyze, inquire, or determine when infringing sales occurred, or if sales occurred within three years prior to the filing date of the Complaint, after the Complaint was filed, and are still being made. *Id.*

The U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's ruling under §507(b) of the Copyright Act (*App. A, 6a*), which is consistent with precedent from the Fifth Circuit holding that the "the relevant inquiry" for determining if a legal claim is actionable under the Copyright Act does not depend on "when the infringement occurred." *See Groden v. Allen,* 2008 U.S. App. Lexis 66 (5th Cir. Jan. 3, 2008). In these cases, the Fifth Circuit analysis of 17 U.S.C. §507(b), expressly rejected any consideration of when infringing sales occurred, or if sales occurred within three years prior to the filing date of the Complaint, after the Complaint was filed, and are still being made.

The Fifth Circuit's decision in these cases would require a copyright holder to assert their copyright rights within three years of any initial publication date. And, if not asserted, the copyright holder would lose all future rights to pursue subsequent sales of the accused works occurring within three years of the filing date of the Complaint. Such an interpretation would effectively deprive a copyright holder (and the estate beneficiaries) of the full benefits of their Copyright rights over the entire term of copyright, which is 70 years after the death of the author.

Under the Fifth Circuit's interpretation of §507(b), it would not "matter when the infringement occurred" if it could be shown that a prior publication occurred three years before the Complaint filing date. *See Groden v. Allen,* 2008 U.S. App. Lexis 66 (5th Cir. Jan. 3, 2008); *Order, App. A, 6a-7a.* Under the Fifth Circuit's interpretation, significant periods of the copyright holders term (e.g. years before death and 70 years after author's death) would be forfeited and forever lost if a defendant could show that an accused infringer published, distributed or sold the accused work outside the three year period. In that event, otherwise viable claims for copyright infringement occurring within three years of the Complaint filing would be barred if it could be shown that an initial publication occurred prior to the three year window for damages allocated by Congress under 17 U.S.C. §507(b).

This Fifth Circuit interpretation of §507(b), which has been rejected by other Circuits, would place a new duty to "police the market" on the

copyright holder, where the copyright holder would be obligated to litigate each and every initial publication, distribution or sale of an accused work, no matter how small or large the initial distribution. Under the Fifth Circuit interpretation, the copyright holders would be obligated to pursue each and every initial publication out of fear that, if not pursued and litigated, their copyright rights held for remaining term of their copyright would be forfeited forever.

The result of the Fifth Circuit's interpretation of §507(b) is that a copyright holder's right to assert their copyright rights as to all subsequent infringing sales would be forever barred because of an initial publication prior to the three year window set forth under §507(b). This interpretation would frustrate the underpinnings of the copyright system. Further, such a new duty to "police the market" against each initial publication, distribution or sale is not present in the wording, language or any reasonable interpretation of 17 U.S.C. §507(b). And, Congress does not appear to have wanted to place such a "duty to police" the market on the copyright holder by enacting §507(b).

Accordingly, this Court should grant the Petition for Writ of Certiorari to reconcile the Fifth Circuit's interpretation of §507(b) with other Circuit's law. The Plaintiff-Petitioner Howard asks that this Court grant the Petition for Writ of Certiorari to resolve the conflict in the interpretation of §507(b) by the various Circuits, and specifically resolve the conflict in favor of the interpretation adopted by the Second, Fourth, and Sixth Circuits analyzing this same issue. *See note 1, supra.*

B. Disputed Facts Regarding Equitable Estoppel Exist, As Well As Other Disputed Legal Issues

When Congress enacted 17 U.S.C. §507(b), Congress could not have envisioned that it would be interpreted to preclude all claims against infringing sales occurring three years before the filing date of the Complaint if it could be shown that an initial publication of the accused work occurred more than three years before the filing date of the Complaint. Such a result does not secure rights of the copyright holder in a fair and equitable manner over the entire term of the copyright holder's copyright term.

As shown by the facts in the present case, there may be a multitude of reasons for not pursuing an accused infringer within a three year period after initial publication. In the present case, the primary distributor communicated repeatedly to the representatives of the Plaintiff-Petitioner as part of a larger scheme to delay any litigation filing. These facts also support a defense of equitable estoppel, which should be addressed by this Court.

Mr. Howard's copyrighted sound recording was used, exactly and identically on Track 15 on the Platinum-selling album, *Undaground Legend* in 2002. Mr. Howard did not receive payment for the use of his copyrighted musical composition in 2002-2003, but he was promised that he would be paid for the use of his copyrighted work and his production services. The following communications and disputed facts are found in the summary judgment motion record.

- One and one-half years after the album release, Mr. Howard was asked in March 2004 to sign paperwork surrounding the use of his copyrighted work so that he could get paid as promised. Two agreements were signed by Mr. Howard, but Mr. Howard still has not been paid.

- The Mechanical License Agreement recognized that the Plaintiff Howard was to receive 50% of the mechanical royalties from the sale of this album.

- After 2004, Sony BMG clearly indicated that it would arrange payment to Mr. Howard. *Letter from Honora Bauman at Sony-BMG dated Sept. 7, 2004, p. 1 (I will arrange for release of mechanical fees).*

- Sony BMG also recognized Mr. Howard's contribution to the Platinum album. *Emails from Sony BMG, Mar. 21, 2005 (Platinum album plaque approval).*

- On October 10, 2005, counsel for Mr. Howard contacted Sony BMG to request information on the status of Sony BMG's payment. On or around December 1, 2005, counsel for Mr. Howard contacted Sony BMG to request information on the status of Sony BMG's payment. On January 26, 2006, counsel for Mr. Howard spoke with Sony BMG about the status of Sony BMG's payment, and Sony BMG confirmed again that Mr. Howard would be paid.

- Sony BMG communicated with Mr. Howard about the status of the payment to the Plaintiff throughout 2006. *Email Sept. 5, 2006 to Sony BMG (request for status); email from Mary-Beth McCardle at Sony BMG, Sept. 5, 2006, 16:23:08 (Have not heard from your attorney regarding dispute); email from Mary-Beth McCardle at Sony BMG, Sept. 15, 2006, 13:18:05 (The dollar amount owed to you would be determined using the contractual percentage).*

- In September 2006, Sony BMG still acknowledged that it was obligated to pay Mr. Howard. *Email Sept. 15, 2006 3:49 to Sony BMG (contract says 2%); email from Mary-Beth McCardle at Sony BMG, Sept. 15, 2006, 15:50:12 ("I will ask them to calculate [sic] that and let you know.").*

- After two years of assurances that payment would be made by Sony BMG to Mr. Howard and that Mr. Howard was due an ownership share, Sony BMG representative responded to Mr. Howard's request for the royalty amount with the response: "None." *Email from Mary-Beth McCardle at Sony BMG, Sept. 15, 2006 ("None").*

All of these communications were provided to the District Court in the summary judgment record, but the District Court found that there was no disputed issues of fact regarding Sony BMG's representations to the Plaintiff-Petitioner that payment would be made. In the present case, the Plaintiff actively requested information on the status of this matter from Sony BMG. In response to the Plaintiff's inquiries, the Defendant Sony BMG's

indicated for years that the Plaintiff was a co-author and co-owner entitled to a royalty percentage, and that Sony BMG would calculate the percentage and get back with him regarding payment.

Under the equitable tolling doctrine, a statute of limitations does not run against a plaintiff who is justifiably ignorant of his cause of action. *See Weber v. Geffen Records, Inc.*, 63 F.Supp.2d 458, 466-467 (S.D.N.Y. 1999); *Zupano v. Quinn*, 2006 N.Y. Lexis 196, *6 (Ct. App. N. Y. Feb. 21, 2006); *Herald Square Music Co. v. Living Music, Inc.*, 1978 U.S. Dist. Lexis 14050, *4 (S.D.N.Y. 1978).

Any delays in bringing the claim are directly attributable to the conduct of Sony BMG and others in making repeated unfulfilled promises of payment. It would be unjust to allow Sony BMG to make lulling assurances to the Plaintiff that there was no problem, but then assert a statute of limitations defense after the present dispute is raised in Court. As such, there are disputed issues of fact as to whether Sony BMG should be equitably estopped from asserting the Statute of Limitations defense under §507(b) of the Copyright Act.

These communications also present disputed issues of material fact as to the Plaintiff-Petitioner's claims of repudiation of copyright ownership, fraud, and negligent misrepresentation. These communications should have been given proper weight in the analysis by the District Court and the Fifth Circuit, but were deemed, as a matter of law, not to create a disputed issue of material fact. The present Petition for Writ of Certiorari should be

granted to determine if a jury should be allowed to consider this disputed evidence in the record.

The Plaintiff-Petitioner Howard asks that this Court grant the Petition for Writ of Certiorari to resolve the conflict in the interpretation of §507(b) by the various Circuits, and specifically resolve the conflict in favor of the interpretation adopted by the Second, Fourth, and Sixth Circuits analyzing this same issue. *See, note 1, supra.*

II. WITHHELD EVIDENCE SHOULD HAVE BEEN CONSIDERED IN REVIEWING THE DISTRICT COURT DECISION

Important documentation that controverts findings of the District Court's Summary Judgment Order was disclosed to the Plaintiff-Petitioner, for the first time, after the close of appellate briefing in the briefing filed at the District Court by a co-defendant of Sony BMG. Namely, an Agency Agreement that obligates Sony BMG to pay third party music providers and copyright holders *(Agency Agreement ¶ 4A, p. 3)* was filed on July 9, 2008 in the District Court pleadings.

This Agency Agreement was withheld from the document production of all the defendants in this matter, including Sony BMG, even though this document had been requested in written discovery. Under this Agency Agreement, Sony BMG became the "agent" for Suckafree Records (one contract signatory) responsible for payment of producer royalties and copyright license fees. *Agency Agreement, ¶ 4A, p.3.* Sony BMG's obligations to pay

copyright holders and music content providers their fees and royalties is set forth in Paragraph 4A, which states that Sony BMG must "make any payments to such music publishers and/or copyright proprietors as are required pursuant to such licenses." *Id., ¶ 4A, p. 3.*

This Agency Agreement was incorporated into a larger Distribution Agreement, and the Agency Agreement was broadened (by incorporation into that larger agreement) to cover Sony BMG's obligations to pay the Plaintiff for the distribution of the accused album. This is, Sony claims these agency agreements relate to different albums, but the agency agreement withheld from production was explicitly incorporated into the terms of the distribution agreement for the *Undaground Legend* album. Sony BMG never produced a copy of the Agency Agreement to the Plaintiff during discovery in this case or any other legal matter involving related parties.

The Agency Agreement came to light for the first time long after briefing was closed in the Fifth Circuit appeal. Sony BMG's Summary Judgment briefing before Judge Ellison (and during this appeal) conspicuously omitted this Agency Agreement from the contractual documentation used to support its arguments, even though this Agency Agreement clearly establishes the "agency" position of Sony BMG, supports the Plaintiff's claims in this matter, supports the denial of Sony BMG's motion for summary judgment, and supports a reversal of the District Court Summary Judgment ruling.

District Court Judge Ellison, after examining this newly-discovered evidence in the later pleading, indicated that it was material, relevant, and clearly should have been provided earlier to the Court. *Order, App.A, 20a-21a.* The Plaintiff-Petitioner Howard requested that the Fifth Circuit consider this newly-discovered evidence based on the findings of the District Court, but those requests were denied.

It is respectfully submitted that in order for justice to be done, this newly discovered "agency" agreement should have been considered during the review of the District Court's decision. The District Court, and a jury, should have been given the opportunity to analyze this newly-discovered evidence in relation to the arguments presented by Sony BMG that it was not contractually obligated to pay the amounts due and owing to the Plaintiff-Petitioner Howard. The District Court, Judge Ellison, even acknowledged the materiality and relevance of this newly discovered evidence when he indicated that it should have been provided to the Court earlier. *Order, App. A, 20a-21a.*

The present Petition for Writ of Certiorari should be granted so the District Court can fully consider all the relevant evidence now made available by Sony BMG, and the Plaintiff-Petitioner should not be prejudiced by the discovery tactic of withholding relevant evidence. This Petition should be granted so that justice may be done.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

OPINIONS BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-20722

JOSEPH HOWARD, JR, presently know as Joe Traxx

Plaintiff-Appellant

v.

SONY MUSIC BMG ENTERTAINMENT

Defendant-Appellee

- -

Appeal from the United States District Court for the Southern District of Texas, Houston

- -

ON PETITION FOR REHEARING AND REHEARING IN EN BANC

(Opinion September 22, 2008, 5 Cir., _____, _____ F. 3d _____)

Before BARKSDALE, BENAVIDES and DENNIS, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active

service on the court having requested that the court be polled on Rehearing En Banc, (FED.R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Rhesa H. Barksdale
United States Circuit Judge

U.S. Court of Appeals
FILED
OCT. 16 2008
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20722

JOSEPH HOWARD, JR, presently know as Joc Traxx

Plaintiff-Appellant

v.

SONY MUSIC BMG ENTERTAINMENT

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:06-CV-3133

Before BARKSDALE, BENAVIDES and DENNIS, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. Rule 47.5.4.

No. 07-20722

I.

For this appeal from a Rule 54(b) judgment, Joseph Howard, Jr. challenges an adverse summary judgment for his claims against Sony Music BMG Entertainment. FED. R. CIV. P. 54(b) (permitting entry of a final judgment as to one or more, but fewer that all, claims or parties). These claims stemmed from a dispute involving music-industry royalties and were primarily rooted in Texas contract law and in the Copyright Act, 17 U.S.C. § 101 and seq. AFFIRMED.

In his amended complaint, Howard, a self-described music composer and producer, alleged, *inter alia*, that his copyrighted musical composition was used for a song included in a 2002 album distributed by Sony. Howard contended that Sony and other parties involved in the album's production were obligated to compensate him.

When Howard did not received compensation, he commenced this action against Sony and others involved in the album's production. (Of course, those claims against other parties are not included in the instant Rule 54(b) judgment). Against Sony, Howard asserted claims for: breach of contract; fraud; negligent misrepresentation; and violations of the Copyright Act and the Texas Theft Liability Act, TEX. CIV. PRAC. & REM. CODE ANN. § 134.001 (Vernon 2007) *et seq.*

Addressing only Howard's claims against Sony, the district court granted summary judgment in favor of Sony on 31 August 2007. The Rule 54(b) judgment was entered that day.

II.

A summary judgment is reviewed *de novo*, applying the same standard as did the district court. *E.g. Wheeler v. BL Dev. Corp.*, 415 F.3d 399, 401 (5th Cir. 2005). Such judgment is appropriate if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

We resolve doubts in favor of the nonmoving party and make all reasonable inferences in favor of that party." *Dean v. City of Shreveport*, 438 F.3d 448, 454 (5th Cir. 2006). No genuine issue of material fact exists, however, if, based on the summary judgment evidence, no reasonable juror could find for nonmovant. *E.g., Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 260 (5th Cir.), *cert. denied*, 128 S.Ct. 181 (2007).

Generally to survive summary judgment, a plaintiff must, *inter alia*, provide sufficient evidence to create a genuine issue of material fact. *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "This Court has cautioned that conclusory allegations,

speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment." *Ramsey v. Henderson*, 286 F.3d 264, 269 (5th Cir. 2002) (citation and internal quotation marks omitted); *see also* FED. R. CIV. P. 56(e)(2) ("party may not rely merely on allegations or denials in its own pleadings").

Howard maintains, *inter alia*: Sony is bound by an *implied* contract to pay royalties; and Howard has provided summary-judgment evidence sufficient to establish claims for fraud and negligent misrepresentation and for violations of the Copyright and Texas Theft Liability Acts.

In granting summary judgment motion to Sony, the district court concluded, *inter alia*: Howard's breach-of-contract, fraud, and misrepresentation claims were inadequately supported because Howard has provided no evidence of an enforceable contract with Sony; Howard's Copyright Act claims were, *inter alia*, barred by the statute of limitations; and Howard has failed, *inter alia*, to provide adequate support for his Texas Theft Liability Act claims. *Howard v. Sony BMG Music Entm't*, No. H-06-3133, slip op. at 2-3 (S.D. Tex. Aug. 31, 2007).

Howard's written contracts concerning use of his material were not with Sony. He fails, *inter alia*, to provide summary-judgment evidence that creates a genuine issue of material fact concerning his claims against

Sony. Essentially for the reasons stated by the district court in its well-reasoned opinion, summary judgment is proper.

III.

For the foregoing reasons, the Rule 54(b) judgment is AFFIRMED.

United States Court of Appeals
Fifth Circuit
FILED
September 22, 2008
Charles R. Fulbruge III
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH HOWARD, Jr. p/k/a "Joe Traxx"	§	
Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
SONY BMG MUSIC ENTERTAINMENT,*et al.*,	§	H:06-3133
Defendants.	§	

MEMORANDUM AND ORDER

Plaintiff Joseph Howard, Jr. seeks recovery against Defendant Sony BMG Music Entertainment, Inc. ("Sony") for Sony's alleged failure to pay amounts due to Plaintiff in connection with Sony's release of a record album. Sony filed a Motion for Summary (the "Motion"). For the reasons that follow, Sony's Motion, Docket No. 30, is GRANTED, and Plaintiff's claims against Sony are DISMISSED WITH PREJUDICE.

I. BACKGROUND

This case involves a matrix of certain contracts, principles of copyright, and communications between Plaintiff and Sony. In particular, Plaintiff alleges that Sony and other

defendants failed to compensate Plaintiff for the incorporation of one of his musical compositions into a song recorded by Defendant Wesley Eric Weston ("Weston"), and released and distributed by Sony. Mr. Howard who describes himself as a solo musician and producer, claims that a copyright musical composition of his was used on the song *R.I.P. Screw*, which was part of a successful album, *Undaground Legend*, that was issued in 2002. Plaintiff contends that he was never paid for the use of his copyrighted musical composition, although he was repeatedly promised that he would be paid for it and for his production services.

Plaintiff and Defendant Suckafree Records, Inc. ("Suckafree") made and entered into a Producer Agreement (attached to Plaintiff's Amended Complaint as Exhibit 1) in August 2002, with Suckafree acting on behalf of Weston. On March 1, 2004, a Mechanical License Agreement ("License Agreement") was made and entered into between Malaco, Inc., on behalf of Plaintiff, and Suckafree. (The License Agreement is attached to the Plaintiff's Amended Complaint as Exhibit B). Sony was not a party to either agreement and Plaintiff does not claim that Sony was.

Beginning in 2004, there were several email communications between Plaintiff and Sony in which Plaintiff asked for payment. Plaintiff contends, under different legal theories, that these communications gave rise to an obligation on the part of Sony to pay Plaintiff for his contributions to *Undaground Legend*. After

these communications failed to produce payment, Plaintiff filed this action in October 2006.

II. SUMMARY JUDGMENT

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. FED. R. CIV. P. 56 (c) (2006). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett,* 247 F.3d 206, 210 (5th Cir. 2001) (quotations omitted). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). The Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Id.*

III. PLAINTIFF'S CONTRACT AND TORT CLAIMS

Plaintiff argues that Sony breached the License Agreement "because Sony BMG clearly indicates that it would be responsible for payment of money owed to [Plaintiff]." The support that Plaintiff offers for this claim, however, is plainly insufficient. The first piece of

evidence adduced in a September 2004 letter from Honora Bauman, the Director of "Copyright & Product Administration" at Sony, which is attached as Exhibit 4 to Plaintiff's Opposition to the summary judgment motion ("Opposition"). In her letter, Bauman states clearly that "Royalties for "R.I.P. Screw" are being held in pending because the mechanical splits provided by the publishers exceed 100." Bauman went on to suggest that Howard "communicate with the other publishers to resolve the split dispute. *Once you've reached agreement and all parties have confirmed revised splits,* I'll arrange the release of the mechanicals on the next accounting" (emphasis added). This language simply cannot be read as imposing on Sony any obligation other than to be an honest broker: *viz* to distribute money in accordance with the claimants' agreement as to the percentage distribution to which each is entitled. It most certainly does not obligate Sony to pay Howard for anything, even if the other parties renege on their obligations.

The second piece of evidence Plaintiff cited in support of his implied contract theory are declarations from Plaintiff and Terry E. Hobbs, a former president of Suckafree (Exs. 8 and 9 to Opposition). These declarations use language that, in many paragraphs, is absolutely identical. Although the declarations are full of conclusory statements, there is again no cognizable evidence that Sony is a party to any king of implied contract. Reference is made to the email between Plaintiff and Mary-Beth McCardle of Sony (Exs. 5 and 6 to Opposition), but her communication do

little more than ask Plaintiff to confirm the percentage share for which Plaintiff had contracted with Suckafree.

Plaintiff has introduced no evidence of an enforceable contract, implied or otherwise, giving rise to the relief Plaintiff seeks. Defendant Sony BMG is therefore entitled to summary judgment on Plaintiff's contract claim. For the same reasons, Plaintiff's claims for fraud and misrepresentation also fail, and summary judgment must be granted to Defendant on those claims as well.

IV. PLAINTIFF'S COPYRIGHT CLAIMS

Plaintiff also alleged violation of his copyright for the melody he composed. However, in the Producer Agreement, Plaintiff transferred to Suckafree all such rights as to R.I.P. Screw. Although Plaintiff argues that the Producer Agreement is invalid and unenforceable because he was never paid the consideration contemplated in the Agreement, in Texas the enforceability of a contract does not depend upon the payment of the consideration promised. *1464-Eight, Ltd. v. Joppich*, 154 S.W. 3d 101(Tex. 2004).

Plaintiff's copyright claims are also barred by the statute of limitations. The latest at which Plaintiff could have been made aware of the copyright infringement would have been August 2002, when *Undaground Legend* was released. The instant suit was not filed until October 2006. The Copyright Act provides that "[n]o civil action

shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued." 17 U.S.C. § 507(B) (2006). Plaintiff seeks to avoid statute of limitations by arguing that the relevant date for the accrual of a copyright action is the date of repudiation, and that repudiation occurred September 2006. Again, however, Plaintiff fails to point to any word or deed by Sony that could fairly be read as repudiation. Plaintiff's reliance on the doctrine of equitable estoppel has the same infirmity. Plaintiff does not point to anything that Sony has done or failed to do that would equitably estop Sony from making any of the arguments that it now offers.

V. PLAINTIFF'S THEFT LIABILITY ACT

Plaintiff also seeks recovery under Texas's Theft Liability Act, TEX. CIV. PRAC. & REM. CODE ANN. § 134.001 (Vernon 2007), *et seq.*, for Sony's alleged theft of Plaintiff's services as a producer, separate and apart from what is owed Plaintiff as a composer. Sony argues that this state law claim is preempted by federal copyright law. There is no need to resolve this legal issue, however, because Plaintiff has to failed to introduce any proof at all that Sony has improperly appropriate anything from Plaintiff. Furthermore, Plaintiff appears also again to be barred by the pertinent statute of limitations. TEX. CIV. PRAC. & REM CODE ANN § 16.003.

VI. CONCLUSION

Sony's Motion is GRANTED. Plaintiff's claims against Sony are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Signed at Houston, Texas on this the 31st day of August, 2007.

/s/ Keith P. Ellison
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH HOWARD, Jr. p/k/a "Joe Traxx"	§	
Plaintiff,	§	
v.	§	
	§	CIVIL ACTION NO.
SONY BMG MUSIC ENTERTAINMENT, *et al.*,	§	H:06-3133
Defendants.	§	

RULE 54(B) CERTIFICATE AND FINAL JUDGMENT AS TO CERTAIN CLAIMS

Pursuant to FED. R. CIV. P. 54(b) and 58(a), and for the reasons set forth in the Memorandum and Order of August 31, 2007, the Court hereby **DIRECTS** an entry of judgment for Defendant Sony BMG Music Entertainment, Inc., and against Plaintiff Joseph Howard, Jr., with respect to all Plaintiff's claims against Sony BMG. The Court finds that there is no just reason for delay in entering the judgment.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 31st day of August, 2007.

/s/ Keith P. Ellison
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH HOWARD, Jr. p/k/a "Joe Traxx"	§	
Plaintiff,	§	
v.	§	
SONY BMG MUSIC ENTERTAINMENT, *et al.*,	§	CIVIL ACTION NO. H:06-3133
Defendants.	§	

MEMORANDUM AND ORDER

Pending before the Court is Plaintiff's Motion for Summary Judgment as to All Claims Asserted Against Estelle D. Hobbs, Hobbs Publishing, and Suckafree Records, Inc. For the following reasons, Plaintiff's Motion, Doc. No. 87, is **DENIED**. Plaintiff's Copyright claims are **DISMISSED WITH PREJUDICE.** Plaintiff's remaining state law claims are **DISMISSED WITHOUT PREJUDICE** to refilling in state court.

I. BACKGROUND

As this Court has summarized in prior Orders, Plaintiff alleges that Defendants Estelle Hobbs, Hobbs Publishing, Suckafree Records, Inc. (collectively, the "Suckafree Defendants"), and others failed to compensate him for the

incorporation of one of his musical compositions into a song recorded by Defendant Wesley Weston, and released and distributed by Sony. Mr. Howard, who describes himself as a solo musician and producer, claims that a copyrighted musical composition of his was used on the song *R.I.P. Screw,* which was part of a successful album, *Undaground Legend.* Plaintiff contends that he was never paid for the use of his copyrighted musical composition, although he was repeatedly promised that he would be paid for it and for his production services.

Plaintiff and Defendants Suckafree Records ("Suckafree"), made and entered into a Producer Agreement (Am. Compl. Ex. 1) in August 2002. On March 1, 2004, a Mechanical License Agreement ("License Agreement") was made and entered into between Malaco, Inc., on behalf of Plaintiff, and Suckafree. (Am. Compl. Ex. B). Defendant Sony was not a party to either agreement. In response to the pending Motion, the Suckafree Defendants now maintain that it assigned the rights of the Producer's Agreement to Sony BMG.[1]

Beginning in 2004, there were several email communications between Plaintiff and Sony in which Plaintiff asked for payment. Plaintiff and the Suckafree Defendants contend, under different legal theories, that these communications gave rise to an obligation on the part of Sony to pay Plaintiff for his contributions to *Undaground Legend.* The Suckafree Defendants, in response to Plaintiff's Motion for

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[1] The Court is not aware of any summary judgment evidence regarding the assignment

Summary Judgment, also contend that pursuant to a Distribution Agency Agreement (Doc. No. 106, Ex. A), Sony was to pay Suckafree Records royalties based on the album delivered and distributed by Sony.[2] The Suckafree Defendants admit in their response brief that the agreement obligated Suckafree Records to pay any producers they hired to work on any song. (Doc. No. 106, 2) The Suckafree Defendants contend that Sony agreed to distribute the royalty payments on behalf of Suckafree Records pursuant to Suckafree's agreements with the producers who worked on the album. The Suckafree Defendants point to section 4A, entitled "Licenses for Musical Compositions, " of the Distribution Agency Agreement, as evidence that Sony was obligated to pay music publishers and copyrights proprietors for music. (Doc. No. 106, Ex. A) Section 4A summarizes Sony's commitment to using reasonable efforts to obtain licenses to reproduce musical compositions and to make payments to music publishers. The Suckafree Defendants also appear to contend that industry custom dictates that Sony would pay Plaintiff royalties.

Ultimately, the Suckafree Defendants argue that Sony has never provided Suckafree or Plaintiff with any royalty payments, and that Sony's only reason for failing to do so is an incorrect allegation by Sony that it did not have

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[2] The Suckafree Defendants did not present the Distribution Agency Agreement in response to Sony BMG's Motion for Summary Judgment on the Suckafree Defendant's Cross-Claims.

the correct paperwork clarifying the percentage ownership or splits of the recording.

In their Answer to Plaintiff's Amended Complaint, and in response to the pending Motion, the Suckafree Defendants provide no evidence or arguments suggesting that they themselves are not liable to Plaintiff pursuant to the Producer Agreement and the Mechanical Agreement. Instead, the Suckafree Defendants focus exclusively on convincing the Court either that they are unable to pay Plaintiff because Sony BMG has failed to provide them with royalties or that Sony BMG is the Defendant that actually owes Plaintiff the money he seeks.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment under the Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. FED. R. CIV. P. 56(c) (2008). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett*, 247 F.3d 206, 210 (5th Cir. 2001) (quotations omitted). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). Conclusory allegations, unsubstantiated

assertions, and unsupported speculation are not competent summary judgment evidence. *See e.g. Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *see also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (noting that a non-movant's burden is "not satisfied with 'some metaphysical doubt as to the material facts'" (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)).* The Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Crawford*, 234 F.3d at 902.

III. ANALYSIS

Plaintiff maintains that the Court should enter summary judgment against the Suckafree Defendants on all of Plaintiff's claims because the Suckafree Defendants have admitted virtually every claim Plaintiff raises in their Answer and fail to contest liability in response to the pending Motion. Plaintiff also contends that the Suckafree Defendants have failed to respond to any of Plaintiff's discovery requests in this lawsuit.

In response to Plaintiff's Motion, the Suckafree Defendants have made an attempt to further clarify Sony BMG's liability, producing evidence that clearly should have been provided to the Court in response to Sony BMG's Motion for Summary Judgment on the Suckafree's

Cross-Claims.[3] The Court has already granted summary judgment in favor of Sony on the Suckafree Defendant's cross-claims, and has dismissed Sony from this lawsuit.

In their Answer, the Suckafree Defendants do admit to some of the allegations related to Plaintiff's claims under the Copyright Act, but appear to argue that Sony was responsible for the actual infringement.[4] In prior Orders, the Court has held that Plaintiff's claims under the Copyright Act are barred by the relevant statute of limitations. (*See, e.g.*, Doc. No. 36, 4-5; Doc. No. 74, 4.) The Court finds, again, that Plaintiff's Copyright claims are barred by the statute of limitations, and must be dismissed. *See, e.g., Eberhardt v. Merck & Co. Inc., 106 Fed. Appx.* 277, 278, 2004 WL 1759247, at *1 (5th Cir. 2004) (unpublished) (citing *Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992) ("Although the defense of limitations usually must be raised by the defendants in the district court, it is also may be raised *sua ponte* by the district court.")

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[3] Plaintiff himself argues that the Suckafree Defendant's response demonstrates why summary judgment should not have been granted for Sony.

[4] The Suckafree Defendants do not clearly admit or deny, for example that "[T]he Defendants infringed, induced others to infringe, and/or contributed to the infringement" of the relevant copyright (Pl.'s Am. Compl. ¶54; Suckafree Defendants' Answer, ¶54.) They instead state "Admit that Plaintiff is a composer of copyrighted sound recordings, and these copyrighted sound recordings were used, distributed, and sold by Sony BMG without alteration or modification . . . for its own financial gain, and without authorization because there was no advance authorization was signed [sic] by any parties and Sony BMG failed to pay proper royalties and consideration for the use of said copyrighted music sound recordings." (Suckafree Defendants' Answer, ¶ 54.)

Plaintiff's remaining claims for breach of contract, fraud, negligent misrepresentation, and under Texas Theft Act are all state law claims, and the parties are not diverse. The Court declines to exercise its supplemental jurisdiction over these claims.

"[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Melon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *see also Guzzino v. Felterman*, 191 F.3d 588, 595 (5th Cir. 1999) (noting the "wide discretion vested in the trial court to order a remand of state claims on the heels of a dismissal of federal claims."). Although this case has been pending for some time and the Court has ruled on the motions between Plaintiff and other defendants, the Court has not adjudicated any claims between Plaintiff and the Suckafree Defendants. There is currently no trial date in place. There is certainly no indication that the parties have spent significant time on discovery. *Cf. Newport Ltd. v. Sears, Roebuck and Co.*, 941 F.2d 302, 307 (5th Cir. 1991) (finding that the district court abused its discretion by declining to exercise pendent jurisdiction on the eve of trial where the district court had devoted "hundreds of Court hours" to the case and years of difficult discovery in federal court had produced "23 volumes and thousands of pages of record, the preparation of a pretrial order exceeding 200 pages, over a

hundred depositions, and according to counsel nearly two hundred thousand pages of discovery production.") Furthermore, despite the Suckafree Defendant's many admissions, the questions of state law in this case are not all crystal clear. For example, Suckafree has not clearly admitted tc Plaintiff's Texas Theft Liability Act claims, [5] and the Court is not all clear how or whether the Texas courts would apply the Act to the facts of this case. In addition, even if the Court were to grant summary judgment on Plaintiff's state law claims, Plaintiff is demanding a jury trial on the question of damages.

Cognizant that the dismissal of state claims, though not mandatory, is generally appropriate when all federal claims have been dismissed, the Court finds that the balancing of the relevant factors leads to the conclusion that Plaintiff's state law claims should be dismissed without prejudice to refilling in state court. *See also* (28 U.S.C.A. § 1367(d) (tolling the limitations period for claims brought under supplemental jurisdiction statute "while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.")); *Dorantes v. de Luna,* No. L-06-180, 2008 WL 375489 (S.D. Tex. Feb. 11, 2008).

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[5] The Defendants have attempted to "Admit with respect to Sony BMG" Plaintiff's Texas Theft Act allegations. (Suckafree Answer, ¶¶ 83-85.)

IV. CONCLUSION

Plaintiff's Motion, Doc. No. 87, is **DENIED.** Plaintiff's Copyright Act claims against the Suckafree Defendants are **DISMISSED WITH PREJUDICE.** Plaintiff's state law claims of breach of contract, fraud, negligent misrepresentation, and theft of service are **DISMISSED WITHOUT PREJUDICE** to refilling in state court.

IT IS SO ORDERED.

SIGNED this 9th day of September, 2008

/s/ Keith P. Ellison
United States District Judge